TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1917

No. [redacted]

HOWARD GOULD, PLAINTIFF IN ERROR,

vs.

KATHERINE GOULD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

[redacted]

(24,985)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 702.

HOWARD GOULD, PLAINTIFF IN ERROR,

vs.

KATHERINE GOULD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	*a*	1
Notice of appeal	1	1
Order appealed from	2	2
Notice of motion	4	2
Affidavit of Owen N. Brown in support of motion	5	3
Final judgment awarding alimony	11	7
Order directing judgment for arrears of alimony	13	8
Affidavit of Katherine C. Gould in support of order for judgment for arrears of alimony	15	9
Judgment for arrears of alimony	17	10
Opinion	18	10
Stipulation waiving certification	19	11
Order of affirmance	21	11
Order denying leave to appeal to the court of appeals	22	12
Writ of error	23	13
Petition for a writ of error	25	14
Order of court of appeals dismissing appeal	32	17
Assignment of errors	33	18
Citation and service	36	19
Bond on writ of error	37	20
Petition for a writ of error	39	23
Præcipe for transcript of record	46	27
Clerk's certificate	51	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1915.

a Supreme Court, Appellate Division, First Department.

KATHERINE C. GOULD, Plaintiff-Respondent,
against
HOWARD GOULD, Defendant-Appellant.

Papers on Appeal from Order.

Martin W. Littleton, Attorney for Defendant-Appellant, 149 Broadway, Borough of Manhattan, New York City.
Griggs, Baldwin & Baldwin, Attorneys for Plaintiff-Respondent, 27 Pine Street, Borough of Manhattan, New York City.

1 *Notice of Appeal.*

Supreme Court, New York County.

KATHRINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

Notice of Appeal.

SIRS: Please take notice that the defendant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the order of the Supreme Court, New York County, entered in the office of the Clerk of New York County, on the 5th day of January, 1915, denying defendant's motion to annul, vacate and set aside a judgment for $212.79 in favor of Kathrine Clemmons Gould against Howard Gould, which judgment was entered in the office of the Clerk of New York County on the 7th day of August, 1914; and defendant also appeals from said judgment for $212.79 in favor of Kathrine C. Gould against Howard Gould; and from each and every part of said order and judgment.

Dated, New York City, January 28, 1915.

MARTIN W. LITTLETON,
Attorney for Defendant.

Office and Post Office Address, 149 Broadway, Borough of Manhattan, City of N. Y.

2 To Griggs, Baldwin & Baldwin, Attorneys for Plaintiff, 27 Pine Street, N. Y. City; Hon. William F. Schneider, Clerk of County of New York, New York City.

Order Appealed From.

At a Special Term of the Supreme Court, Part I Thereof, Held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 5th day of January, 1915.

Present: Hon. Peter A. Hendrick, Justice.

KATHRINE CLEMMONS GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

County Clerk's Index, Number 21,927, 1914.

A motion having been made by the defendant, Howard Gould, for an order annulling, vacating, and setting aside the judgment for $212.79 in favor of Kathrine C. Gould against Howard Gould, entered in the office of the clerk of New York County on the
3 7th day of August, 1914, and the same having duly come on to be heard.

Now, upon reading the notice of motion, dated October 26, 1914, the affidavit of Owen N. Brown, verified October 26, 1914, with proof of due service upon the attorneys for the plaintiff, the decree of separation in this action, entered in the office of the clerk of New York County, September 22, 1909, the judgment in favor of the plaintiff and against the defendant for the sum of $212.79, entered in the office of the clerk of New York County on August 7, 1914, the order of Mr. Justice John Ford, made August 6, 1914, in this action, and the affidavit of Kathrine C. Gould, verified August 4, 1914, on which, said judgment is based, all in support of said motion; and after hearing Martin W. Littleton, Esq., attorney for the defendant in support of said motion, and William L. Marshall, Esq., of counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon, and upon filing of the opinion of the court,

Now, on motion of Griggs, Baldwin & Baldwin, attorneys for the plaintiff, it is

Ordered, that said motion be and the same hereby is in all respects denied.

Enter,

P. A. H., *J. S. C.*

1 *Notice of Motion.*

Supreme Court, New York County.

KATHERINE CLEMMONS GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

Please take notice, That upon the annexed affidavit of Owen N. Brown, verified the 26th day of October, 1914; a copy of which is

herewith served upon you; on the decree of separation in this action entered in the office of the Clerk of New York County on the 22nd day of September, 1909; on the judgment in favor of plaintiff against defendant for the sum of $212.79 entered in the office of the Clerk of New York County on the 7th day of August, 1914; and on the affidavit and order on which said judgment is based, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the County Court House in the Borough of Manhattan, County and City of New York, on the tenth day of November, 1914, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order annulling, vacating and setting aside the judgment for the sum of $212.79 in favor of Katherine C. Gould against Howard Gould entered in the office of the Clerk of New York County on the 7th day of August, 1914; and for such other and further relief as may be just, and the costs of this motion.

Answering affidavits must be served five days before the return day.

Dated New York City, October 26th, 1914.

MARTIN W. LITTLETON,
Attorney for Defendant.

Office and Post Office Address, 149 Broadway, Borough of Manhattan, New York, N. Y.

To Griggs, Baldwin & Baldwin, Esqs., Attorneys for Plaintiff, 27 Pine Street, New York, N. Y.

Affidavit of Owen N. Brown in Support of Motion.

Supreme Court, New York County.

KATHERINE CLEMMONS GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Owen N. Brown, being duly sworn, says that he is an attorney at law associated with Martin W. Littleton, Esq., practicing law at 149 Broadway, New York, N. Y., and is familiar with the alimony and income tax questions presented by this motion.

That on the 22nd day of September, 1909, a final decree was entered in this action, copy of which is hereto annexed, marked Exhibit A, and made a part of this affidavit. That the alimony of $3,000 per month awarded to the plaintiff by said decree has been paid to the plaintiff in accordance with the terms of said decree, except the deductions, hereinafter referred to, made under the provisions of the Federal income tax law of 1913. That after the enactment of said income tax law in October, 1913, the question was pre-

sented as to whether said alimony was taxable as income of Katherine Gould; and, if so, whether Howard Gould was required by said law to deduct and withhold the amount of the income tax due thereon. That on the 24th day of November, 1913, Martin W. Littleton, attorney for Howard Gould, wrote to Arthur J. Baldwin, attorney for the plaintiff, Katherine Clemmons Gould, a letter of which the following is a copy:

"I enclose herewith Mr. Howard Gould's check for $3,000, drawn "to my order and endorsed by me, same being the usual monthly "alimony payment to Mrs. Gould:

"There seems to be some doubt as to whether the income tax "should be deducted from this alimony, but until the matter is set- "tled by the proper authorities I shall continue to send the check "to you as at present. In case the Commissioner of Internal Rev- "enue should decide that the income tax should be properly deducted "from this alimony, it will be necessary for me to deduct it from "the first day of March last, at which time the income tax law be- "came effective,"

7 and enclosed therewith Mr. Gould's check for the sum of $3,000.

That on November 26th, 1913, Mr. Littleton received from Mr. Baldwin a letter of which the following is a copy:

"Your letter of the 24th inst. with contents is received."

That on January 6th, 1914, Mr. Littleton wrote Hon. W. H. Osborne, Commissioner of Internal Revenue, at Washington, D. C., asking whether or not the alimony due Mrs. Gould under the terms of said decree was taxable as income of Mrs. Gould; and, if so, whether Mr. Gould was required to deduct and withhold from this income the amount of the tax due thereon. That on or about January 21st, 1914, Mr. Littleton received from Mr. L. F. Speer, Deputy Commissioner of Internal Revenue, a letter of which the following is a copy:

"SIR: I have the honor to acknowledge the receipt of your letter "of the 6th instant, requesting information as to the liability to the "tax imposed by the Federal income tax law of October 3, 1913, of "alimony paid under a decree of separation.

"In reply, you are advised that this office holds that alimony paid "under final decree, or under a decree of separation, is fixed and "determinable annual income, and in cases where it is in excess of "$3,000, the person paying such alimony is required to withhold the "normal tax on the same, unless the former wife claims an exemption "under paragraph C of the law, in which case, he will withhold the "normal tax on the amount of alimony paid in excess of the ex- "emption claimed. Further, the husband, as he is not living with "his wife, will be allowed an exemption of $3,000 under the

8 "law and regulations, and the amount of alimony paid can- "not be deducted from gross income in the return of a person "paying such alimony."

That on February 3rd, 1914, Mr. Littleton mailed to Mr. Baldwin,

attorney for the plaintiff, a copy of the opinion of said Deputy Commissioner of Internal Revenue.

That on April 20th, 1914, Mr. Littleton wrote Mr. Baldwin a letter of which the following is a copy:

"I am enclosing herewith Howard Gould's check for $2,880, payable to my order and endorsed by me, being the usual monthly alimony due Mrs. Howard Gould, less the income tax for the months of January, February and March, 1914. I will instruct Mr. Gould's office to deduct the income tax for November and December, 1913, from the next check.

"Kindly acknowledge receipt, and oblige,"

and enclosed therewith Mr. Gould's check for $2,880. That a few days prior to the 20th of April, 1914, Mr. Littleton had a conference with Mr. Baldwin about the matter of the income tax for the months of November and December, 1913, and was requested by Mr. Baldwin to deduct the amount of this tax from the May alimony check. That immediately after this conference Mr. Littleton informed Mr. Gould's secretary of the request made by Mr. Baldwin.

That on or about April 22nd, 1914, Mr. Littleton received from Mr. Baldwin a letter of which the following is a copy:

"I acknowledge the receipt of yours of April 20, with enclosure
"as therein stated, and note that you have deducted the in-
9 "come tax for the months of January, February, March and
"April.

"I filed for Mrs. Gould an income tax report, in which I accounted for income exactly as she received it. In making the report I did not state that any of the tax had been withheld at the source. Consequently, I shall receive a bill from the Government upon the whole amount, and as I do not want to pay the tax twice, please do not deduct anything for the months of November and December."

That on May 15th, 1914, Mr. Littleton wrote Mr. Baldwin a letter, of which the following is a copy:

"I enclose herewith Mr. Howard Gould's check to my order (and which I have endorsed) for the sum of $2,910, being the usual alimony due Mrs. Gould, less income tax deducted for the months of November and December, 1913, and the month of May, 1914,"

and enclosed therewith Mr. Gould's check endorsed by Mr. Littleton for the sum of $2,910.

That on June 17th, 1914, Mr. Littleton wrote Mr. Baldwin and enclosed Mr. Gould's check, payable to the order of Mr. Littleton and endorsed by him, for the sum of $2,970.

That on July 16th, 1914, Mr. Littleton wrote Mr. Baldwin and enclosed with his letter Mr. Gould's check for the sum of $2,970.

That Katherine Gould has not filed with Howard Gould a notice claiming the benefit of the exemption of $3,000 allowed by paragraph C, Sec. II of the Federal income tax law; that Katherine Gould has not filed with Howard Gould a return of her annual gains,

profits and income from all other sources, as authorized by paragraph E, Sec. II, of said law.

That on or about the 6th day of August, 1914, Griggs, Baldwin & Baldwin, Esqs., attorneys for plaintiff, Katherine Clemmons Gould, obtained an ex parte order, a copy of which and of the affidavits upon which it is based, are annexed hereto, marked Exhibit B, and made a part of this affidavit.

That on the 7th day of August, 1914, judgment was entered in the office of the clerk of New York county, in accordance with the terms of said order, copy of which is hereto annexed, marked Exhibit C, and made a part of this affidavit.

That on the 7th day of August, 1914, Mr. Baldwin wrote Mr. Littleton a letter enclosing a copy of said judgment, together with copies of the affidavit and order on which same was based, with the statement that he desired to raise the question as to whether Mrs. Gould's alimony was subject to the provisions of the Federal income tax law.

That Mr. Gould is personally liable to the United States Government under the provisions of said income tax law for the amount of the tax due by said Katherine Gould to the Government on account of said alimony being income under said law and the deduction of one per cent. on the amount of the installments of alimony paid by Howard Gould to Katherine Gould for the months of January, February, March, April, May, June and July, aggregating the sum of $210 were lawfully made; and the judgment in favor of Katherine Gould against Howard Gould for the sum of $212.79, the amount of said deductions and interest, is without warrant in law and should be vacated and annulled.

Wherefore, deponent prays that said judgment entered in the office of the clerk of New York County in favor of Katherine Clemmons Gould against Howard Gould for the sum of $212.79, be vacated, annulled and set aside, and that he have such other and further relief as he may be entitled to in the premises, together with the costs of this motion.

(Sgd.) OWEN N. BROWN.

Subscribed and sworn to before me this 26th day of October, 1914.

[SEAL.] EDWARD A. GILL WYLIE,
Notary Public, New York County.

New York County No. 4096.
New York County Register No. 6066.

EXHIBIT "A."

Final Judgment Awarding Alimony.

At a Special Term of the Supreme Court, Part V Thereof, Held at the County Court House, in the Borough of Manhattan, City of New York, on the 25th Day of June, 1909.

Present: Hon. Victor J. Dowling, Justice.

KATHRINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

Decree.

The issues in the above entitled action having been regu-
12 larly brought on for trial at a Special Term of this Court, held by Mr. Justice Dowling in Part V thereof, in the County Court House, in the Borough of Manhattan, City and County of New York, on 10th, 11th, 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th and 25th days of June, 1909, and decision thereon having been rendered for the plaintiff by the Court after hearing the allegations and proofs of the parties, and after due deliberation, and having been filed on the 22nd day of September, 1909;

Now, on motion of Clarence J. Shearn, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the said plaintiff and defendant be separated from bed and board forever; and it is further

Ordered, adjudged and decreed that the defendant, Howard Gould, above named, pay to the plaintiff the sum of $3,000 every month from the date of the entry of this decree for the support and maintenance of the plaintiff during her natural life, said sum to be paid into the hands or upon the order of the plaintiff's attorney of record in this action, Clarence J. Shearn, such payment not to be in lieu of plaintiff's right of dower in the defendant's real estate; and it is further

Ordered, adjudged and decreed that the plaintiff, Kathrine C. Gould, recover of the defendant, Howard Gould, the costs and disbursements of this action taxed by the Clerk of this Court at the sum of $3,683.56.

Enter:

VICTOR J. DOWLING,
Justice Supreme Court.

13 Judgment signed and entered this 22nd day of September, 1909, nunc pro tunc as of June 25, 1909.

PETER J. DOOLING, *Clerk.*

(N. Y.)
(L. S.)
(M. J. D.)

A Copy.

WM. F. SCHNEIDER, *Clerk.*

Exhibit "B."

Order Directing Judgment for Arrears of Alimony.

At a Special Term, Part II Thereof, of the Supreme Court, Held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 6th Day of August, 1914.

Present: Hon. John Ford, Justice.

Katherine C. Gould, Plaintiff,
against
Howard Gould, Defendant.

The plaintiff herein having made application for an order directing the Clerk of the County of New York to enter a money
14 judgment in the above entitled action in favor of the plaintiff and against the defendant for arrears of alimony due and unpaid under the final decree of separation, entered herein and dated the 25th day of June, 1909, now on reading and filing the affidavit of Katherine C. Gould, verified the 4th day of August, 1914, annexed hereto, and on said final decree of separation heretofore entered herein, it is, on motion of Griggs, Baldwin & Baldwin, attorneys for the plaintiff herein,

Ordered that the plaintiff, Katherine C. Gould, recover of the defendant, Howard Gould, the arrears of alimony with interest thereon now due under said final judgment entered herein on the 25th day of June, 1909, as follows: The sum of One hundred and twenty dollars ($120) due the 15th day of April, 1914, with interest on the same amounting to Two and 10/100 dollars ($2.10); the further sum of Thirty dollars ($30) due the 15th day of May, 1914, with interest on the same amounting to thirty-eight cents (38 cts.), the further sum of Thirty dollars ($30) due on the 15th day of June, 1914, with interest on the same amounting to twenty-three cents (23 cts.), and the further sum of Thirty dollars ($30) due the 15th day of July, 1914, with interest on the same amounting to eight cents (.08 cts.), amounting in all to the sum of Two hundred and ten dollars ($210), principal and Two and 79/100 dollars ($2.79) interest, making a total of Two Hundred twelve and 79/100 dollars ($212.79), and it is

Further ordered, that the Clerk of the County of New York be and he hereby is directed to docket said judgment for the sum of Two hundred twelve and 79/100 dollars ($212.79) in favor of Katherine C. Gould, plaintiff, and against Howard Gould, defend-
ant, pursuant to the provisions of Section 1246 of the Code
15 of Civil Procedure, and that said plaintiff have execution therefor.

Enter,

J. F., *J. S. C.*

Affidavit of Katherine C. Gould in Support of Order for Judgment for Arrears of Alimony.

Supreme Court, New York County.

KATHERINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

Katherine C. Gould, being duly sworn, deposes and says: That she is the plaintiff in the above entitled action and the wife of the defendant Howard Gould. That the defendant is still living and a resident of the State of New York. That on or about the 22nd day of September, 1909, a decree of separation was entered in the above entitled action as of the 25th day of June, 1909, in favor of deponent separating her from the defendant upon the grounds that the defendant without justification or legal excuse therefor had
16 abandoned her. That said decree has not been modified and is still in full force and effect. That by the terms of said decree so entered the defendant was directed to pay to deponent the monthly sum of Three thousand dollars ($3,000) for her support and maintenance. That the defendant paid the alimony as directed by the said decree until the 15th day of April, 1914. That on that day instead of paying the usual monthly allowance of Three thousand dollars ($3,000), as directed by said decree, he paid to said deponent the sum of Two thousand eight hundred and eighty dollars ($2,880) and has failed to pay the balance of One hundred and twenty dollars ($120). That on the 15th day of May, 1914, defendant paid to deponent the sum of Two thousand nine hundred and seventy dollars ($2,970) instead of the sum of Three thousand dollars ($3,000), as directed by said decree, and has failed to pay the balance of Thirty dollars ($30). That on the 15th day of June, 1914, defendant paid to deponent the sum of Two thousand nine hundred and seventy dollars ($2,970) instead of the sum of Three thousand dollars ($3,000) as directed by said decree, and has failed to pay the balance of Thirty dollars ($30). That on the 15th day of July, 1914, defendant paid to deponent the sum of Two thousand nine hundred and seventy dollars ($2,970) instead of the sum of Three thousand dollars ($3,000), as directed by said decree, and has failed to pay the balance of Thirty dollars ($30).

That deponent verily believes that it is necessary in order to protect her rights that a money judgment be docketed for the arrears of alimony herein set forth amounting to Two hundred and
17 ten dollars ($210) and interest, and that deponent be allowed to issue execution therefor.

That no previous application has been made for this order.

(Sgd.) KATHERINE C. GOULD.

Sworn to before me this 4th day of August, 1914.
(Sgd.) KATHRYN A. FOX,
Notary Public, 1103, *New York County.*

EXHIBIT "C."

Judgment for Arrears of Allimony.

Copy.

Supreme Court, New York County.

KATHERINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

A final decree having been entered in this action on the 22nd day of September, 1909, nunc pro tunc as of the 25th day of June, 1909, providing that the defendant pay to the plaintiff the sum of Three thousand dollars per month alimony, and the defendant having failed to pay the alimony, as provided for in said decree, and the plaintiff having made a motion for an order, directing the clerk to docket a money judgment for the arrears of said alimony, and such order having been made and entered herein on the 6th day of August, 1914, directing the clerk of the County of New York to enter a money judgment in favor of the plaintiff and against the defendant for the sum of Two hundred twelve and 79/100 ($212.79) Dollars, arrears of alimony and interest,

Now, on motion of Griggs, Baldwin & Baldwin, attorneys for plaintiff, it is

Adjudged that the said plaintiff, Katherine C. Gould, recover of the said defendant, Howard Gould, the sum of Two hundred twelve and 79/100 (212.79) Dollars, and that the Plaintiff have execution therefor.

Judgment this 7th day of August, 1914.
(Sgd.) WM. F. SCHNEIDER, *Clerk.*

Opinion.

GOULD
vs.
GOULD.

The question to be determined on this motion is whether or not alimony paid to a wife in pursuance of a judgment of divorce is "income" within the meaning of the Federal Income Tax Law. It is the duty of a husband to support his wife, and there can be no pretense that if the parties were living together and the husband were paying the expenses of maintenance of his wife or were allowing her a specific sum with which to pay her expenses, such payment by him or allowance to her could be construed

as her "income" within the meaning of the Federal Income Tax Law. In that case he would be only fulfilling the obligation which the marital relation imposed upon him. It remains simply to consider whether or not a judgment of divorce, containing a provision that the husband pay a specific sum to his wife for her maintenance and support, converts the sum so paid by him into "income" received by her. To me it seems clear that the amount of alimony allowed cannot be regarded as "income". The court simply intervenes to fix the amount of the continued obligation of the husband to maintain his wife, and the money so expended under a decree of the court is, in legal effect, no different from the money paid by the husband for the maintenance of his wife while they are living together and which would not be taxable against her under the Federal Income Tax Law. These views are supported by Romaine v. Chauncey (129 N. Y., 566). Motion to vacate is denied. Settle order on notice.

Stipulation Waiving Certification.

It is hereby stipulated that the papers on appeal, as hereinbefore printed, consist of true and correct copies of the notice of appeal, order and judgment appealed from, and all the papers upon which the Court below acted in making the order appealed from and specified in said order and the whole thereof, now on file in the
20 office of the Clerk of the County of New York, together with a copy of the opinion rendered.

Certification thereof is hereby waived, pursuant to Section 3301 of the Code of Civil Procedure.

Dated, March 1, 1915.

MARTIN W. LITTLETON,
Attorney for Appellant, Howard Gould.
GRIGGS, BALDWIN, &
BALDWIN,
Attorneys for Respondent, Katherine C. Gould.

21 At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York, on the 1st Day of April, 1915.

Present:
Hon. George L. Ingraham, Presiding Justice;
" John Proctor Clarke,
" Francis M. Scott,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Justices.

KATHERINE GOULD, Resp't,
vs.
HOWARD GOULD, App'l't.

Affirmance of Order.

An appeal having been taken to this Court by the defendant from an order of the Supreme Court entered on the 5th day of January,

1915, and said appeal having been argued by Martin W. Littleton of counsel for the appellant, and by Mr. Alfonse F. Spiegel, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter.

G. L. I.

(Endorsed:) County Clerk's File No. 21927—Year 1914; Appellate Division of the Supreme Court, First Judicial Department; Katherine Gould, respondent, v. Howard Gould, Appellant; Order Affirming Order.—Filed April 6, 1915.

22 At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York, on the 28th Day of May, 1915.

Present:

Hon. George L. Ingraham, Presiding Justice;
" John Proctor Clarke,
" Francis M. Scott,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Justices.

KATHRINE C. GOULD, Resp't,
vs.
HOWARD GOULD, App'l't.

Order Denying Leave to Appeal to the Court of Appeals.

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 1st day of April, 1915,

Now, upon reading and filing the notice of motion with proof of due service thereof and the affidavit of Owen N. Brown, in support of said motion and the affidavit of Alfone F. Spiegel, in opposition thereto and after hearing Mr. Brown for the motion and Mr. Spiegel opposed

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter,

G. L. I.

(Endorsed:) County Clerk's File No. 21927—Year 1914; New York Supreme Court, New York County; Katherine C. Gould, Respondent against Howard Gould, Appellant; Order Denying Leave to Appeal to the Court of Appeals—Filed June 1, 1915.

23 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Katherine Gould, plaintiff and Howard Gould, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any
24 treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said defendant, Howard Gould, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of September, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 21927—1914. Supreme Court of the United States. October Term, 191—. Howard Gould, vs. Katherine Gould. Writ of Error. Received Sep. 14, 1915. A copy of the within Writ of Error received this 13 day of September, 1915. A. F. Spiegel, Att'y for Katherine Gould, Defendant in Error.

To the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States:

The Petition of Howard Gould, a citizen of the State of New York, respectfully shows:

1. That on the 22d day of September, 1909, in an action pending in the Supreme Court in the County and State of New York, after a trial before Mr. Justice Dowling, there was entered nunc pro tunc as of June 25, 1909, and filed in the Office of the Clerk of New York County, a final judgment separating the plaintiff in that action, Katherine Gould, and the defendant, Howard Gould, from bed and board forever, and requiring the defendant to pay plaintiff, during the natural life of plaintiff, the sum of three thousand ($3,000) dollars each and every month from the date of said judgment; that Howard Gould, the defendant in said action, is the petitioner herein; that the alimony awarded Katherine Gould by the terms of said judgment was thereafter duly and regularly paid her as required by the provisions thereof.

2. That after the passage of the Federal Tariff Act of 1913 entitled "An act to Reduce Tariff duties and to Provide Revenue for the Government and For Other Purposes", petitioner was advised by the United States Commissioner of Internal Revenue at Washington that alimony payable under a decree of separation is fixed and determinable annual income under the provisions of said income tax law, and that in cases where such alimony is in excess of three thousand ($3,000) dollars per annum, the person paying the
26 same is required to withhold the normal tax due the Government thereon; that thereafter the petitioner, in obedience to the terms of said income tax law, deducted one (1%) per cent, the amount of the normal tax, from the $3,000 payable as aforesaid to Katherine Gould as alimony for each of the months of January, February, March, April, May, June and July, 1914; that the amount of such deductions aggregated the sum of $210; that said Katherine Gould has not claimed any deduction under paragraph C of said Income Tax Law.

3. That on the 6th day of August, 1914, Katherine Gould procured the making and entry of an ex parte order in the Supreme Court, New York County, which order recited that petitioner was in arrears in the payment of alimony due and payable under the judgment in said separation action, amounting to $210 principal and $2.79 interest, aggregating $212.79, and ordered the Clerk of the County of New York to enter a judgment in favor of said Katherine Gould and against petitioner for the sum of $212.79, pursuant to the provisions of Section 1246 of the Code of Civil Procedure of the State of New York; that on the 7th day of August, 1914, a final judgment was entered in the office of the Clerk of the County of New York under and pursuant to the terms of said order in favor of Katherine Gould against petitioner for the sum of $212.79.

4. That after the entry of said judgment petitioner made a motion in the Supreme Court, New York County, to vacate the judgment on the ground that the arrears in said alimony on which said judgment

had been rendered was caused by the fact that petitioner had
27 deducted from the amount of the alimony payable under the terms of the judgment of separation the 1% which he was required to deduct and withhold by the provisions of said income tax law; that said motion was opposed by Katherine Gould, came on for argument before Mr. Justice Hendrick and was submitted on briefs for both parties.

5. That on the 5th day of January, 1915, an order was signed by Mr. Justice Hendrick, one of the justices of the Supreme Court of New York County, and entered in the office of the Clerk of New York County, denying the motion made by petitioner to vacate said judgment; that Mr. Justice Hendrick in denying the motion wrote a short opinion in which he stated that alimony was not "income" within the meaning of the Federal Income Tax Law.

6. That thereafter petitioner appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the order denying his motion to vacate the judgment for $212.79; that under the laws of the State of New York, said Appellate Division was the only court that had jurisdiction to hear and determine said appeal; that a transcript of the proceedings in the court below was filed in said Appellate Division and the appeal from the judgment for $212.79 and from the order denying the motion to vacate the judgment, came on for argument in said Appellate Division and was submitted on briefs by both parties; that on the 1st day of April, 1915, said Appellate Division unanimously affirmed without opinion the order appealed from, and an order of affirmance was entered in the office of the Clerk of said Court; that immediately thereafter a certified copy of the order of the Appellate Division
28 affirming the order appealed from was filed in the office of the Clerk of New York County as required by law, together with the original case or papers on which said appeal was heard; that on the 8th day of April, 1915, the costs and disbursements of the appeal in the sum of twenty-two dollars and sixty-two cents ($22.62) were taxed against petitioner.

7. That thereafter on the 22d day of April, 1915, petitioner served on the attorneys for Katherine Gould a notice of Appeal to the Court of Appeals from the order of the Appellate Division affirming the order appealed from and at the same time filed an undertaking in the sum of $500 to secure the payment of costs and damages and also an undertaking to secure the payment of the judgment for $212.79; that immediately after the service of said notice of appeal and on the 23d day of April, 1915, the attorney for Katherine Gould made a motion in the Court of Appeals to dismiss the appeal so attempted to be taken on the ground that leave to appeal had not been granted petitioner by the Appellate Division, First Department, under the provisions of Sections 190 and 191 of the Code of Civil Procedure of the State of New York; that said motion came on for argument before the Court of Appeals and was duly submitted and thereafter on the 4th day of May, 1915, the Court of Appeals dismissed without opinion said appeal so attempted to be taken by petitioner as aforesaid to that court; that a copy of

the order of dismissal is hereto annexed and made a part hereof; that on the 11th day of May, 1915, an order was duly made by Mr. Justice Weeks, one of the justices of the Supreme Court of
29 New York County and entered in the office of the Clerk of New York County, ordering and directing that the order of the Court of Appeals, dated May 4, 1915, dismissing the said appeal, be made the order of the Supreme Court.

8. That thereafter on the 14th day of May, 1915, and at the next term of the Appellate Division after the entry of the order of affirmance, petitioner made a motion before the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, asking that court for the certificate authorized by subdivision 2 of Section 190 of the Code of Civil Procedure of the State of New York to the effect that in its opinion questions of law were involved that ought to be reviewed by the Court of Appeals and asking it to certify to the Court of Appeals for review the question whether or not alimony of $3,000 per month awarded to the wife by the terms of the final decree in a separation action constituted "gains, profits and income" within the meaning of the provisions of Section II of the Tariff Act of 1913 passed by the United States Congress entitled "An act to Reduce Tariff Duties and to Provide Revenue for the Government and For Other purposes" and whether or not the husband should deduct and withhold from the amount of said alimony of $3,000 the normal tax of 1% claimed by the Federal Government to be due thereon; that the said motion came on for argument before the Appellate Division on the 21st day of May, 1915, and was submitted without argument; that thereafter, on the 28th day of May, 1915, said Appellate Division denied the motion and an order was entered in the office of the Clerk of said court to that effect.

30 9. That said Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is now and was at the time of said appeal, the highest court of the State of New York that could pass on the right of petitioner to have said judgment for the sum of $212.79 set aside, annulled and vacated, unless said Appellate Division should certify questions of law involved therein for review by the Court of Appeals under Section 190 of the Code of Civil Procedure of the State of New York, which said Appellate Division declined to do.

10. That there was drawn in question and involved in this suit the right, privilege and duty of petitioner to withhold and deduct under the provisions of the Federal Income Tax Law of 1913, the amount of the normal tax due by Katherine Gould to the Federal Government on the ground that the alimony payable to Katherine Gould by the terms of said judgment of separation was income under the provisions of said Federal Income Tax Law and that petitioner was required by said Income Tax Law to deduct from said alimony payable to Katherine Gould for said months the sum of $210 and that petitioner was personally liable to the Federal Government for the amount so deducted and that said judgment of $212.79 was therefore illegal and should be vacated; that his right, privilege and duty on

the part of petitioner was set up and claimed on petitioner's motion to vacate the judgment for $212.79 and on the appeal from the order denying said motion.

Wherefore your petitioner prays that a writ of error may issue and that he may be allowed to bring up for review before the Supreme Court of the United States the said order of said Appellate Division of the Supreme Court of the State of New York,
31 First Judicial Department, affirming the order appealed from; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

MARTIN W. LITTLETON,
Attorney for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Martin W. Littleton, being duly sworn, deposes and says that he is attorney for Howard Gould, the petitioner named in the foregoing petition; that this petition cannot be signed and verified by Mr. Gould for the reason that he is not in the State of New York but is in France at the present time; that deponent is familiar with the facts stated in the foregoing petition and the facts therein stated are true.

MARTIN W. LITTLETON.

Sworn to and subscribed before me this 25th day of August, 1915.

[Seal Edward A. Gill Wylie, Notary Public, New York County.]

EDWARD A. GILL WYLIE,
Notary Public, New York County.

New York County No. 4096.
New York County Register No. 6066.

32 STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York Held at the Capitol, in the City of Albany, on the Fourth Day of May, A. D. 1915.

Present: Hon. Willard Bartlett, Chief Judge, Presiding.

KATHERINE C. GOULD, Respondent,
against
HOWARD GOULD, Appellant.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above entitled action to this Court; and papers having been submitted in support of said motion and in opposition thereto; and due deliberation having been thereupon had;

It is ordered, that the said motion be, and the same hereby is, granted and appeal dismissed with costs and ten dollars costs of motion,

A Copy.

[Seal of Court of Appeals.]

JOHN H. REYNOLDS,
Deputy Clerk.

[Endorsed:] Kathrine C. Gould, Plaintiff, against Howard Gould, Defendant. Petition by Howard Gould for Writ of Error. Martin W. Littleton, Attorney for Petitioner. Office and Post-Office Address, 149 Broadway, New York City. Let the Writ Issue. Rangeley, Me., Aug. 27, 1915. Charles E. Hughes, Associate Justice of the Supreme Court of the United States.

33 Supreme Court of the United States.

HOWARD GOULD, Plaintiff in Error,
against
KATHERINE GOULD, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause:

1. The Appellate Division of the Supreme Court of the State of New York, First Department, erred in affirming the order of the court below which denied the motion made by plaintiff in error to set aside the judgment entered in the office of the clerk of the Supreme Court of New York County in favor of the defendant in error against plaintiff in error for the sum of $212.79.

2. The Appellate Division of the Supreme Court of the State of New York, as well as the court below, erred in holding that the alimony ordered to be paid by plaintiff in error (the husband) to defendant in error (the wife) by the terms of the judgment obtained by defendant in error against plaintiff in error in the separation action tried in the Supreme Court of the State of New York, was not "income" within the meaning of the provisions of the Federal Income Tax Law of 1913.

3. The Appellate Division of the Supreme Court of the State of New York, as well as the court below, erred in holding that the plaintiff in error was not required and did not have the right
34 under the provisions of the Federal Income Tax Law of 1913 to deduct and withhold the amount of the normal tax due by the defendant in error to the Federal Government from the alimony payable by plaintiff in error to the defendant in error under the terms of the final judgment rendered in the separation action

tried in the Supreme Court of the County and State of New York in 1909.

4. The Appellate Division of the Supreme Court, as well as the court below, erred in holding that the alimony of $3,000 per month payable by plaintiff in error to defendant in error for her support and maintenance under the terms of the final judgment rendered in the separation action tried in the Supreme Court of the State of New York in 1909, was not taxable as "gains, profits and income" within the meaning of the provisions of Section 2 of the Tariff Act of 1913 passed by the United States Congress entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and For Other Purposes."

5. The Appellate Division of the Supreme Court of the State of New York, as well as the court below, erred in refusing to vacate and set aside the judgment obtained in the Supreme Court of the State of New York by defendant in error against plaintiff in error for the sum of $212.79 entered in the office of the Clerk of New York County on the 7th day of August, 1914.

Wherefore the plaintiff in error prays that the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, made on the first day of April, 1915, affirming the order of the Supreme Court of the State of
35 New York made on the 5th day of January, 1914, denying the motion made by plaintiff in error to vacate the judgment against him in favor of defendant in error in the sum of $212.79, be reversed and that said judgment for $212.79 be vacated, unnulled and set aside.

Dated New York City, Aug. 30/1915.

MARTIN W. LITTLETON,
Attorney for Plaintiff in Error.

35½ [Endorsed:] Supreme Court of the United States. Howard Gould, Plaintiff in error, against Ketherine Gould, Defendant in error. Assignment of Errors. Martin W. Littleton, Attorney for Plaintiff in error. Office and Post-Office Address, 149 Broadway, New York City.

36 UNITED STATES OF AMERICA, *ss:*

To Katherine Gould, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Howard Gould is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of

the Supreme Court of the United States, this 7th day of September, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Copy of the within Citation received this 13 day of September, 1915. A. C. Spiegel, Att'y for Katherine Gould, Defendant in Error.

37 Supreme Court of the United States.

KATHRINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

Know all men by these presents, That the Fidelity and Deposit Company of Maryland, is held and firmly bound unto Kathrine C. Gould in the sum of Five Hundred Dollars ($500), lawful money of the United States, to be paid to her, her legal representatives or assigns; for which payment, well and truly to be made the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal, and dated this Thirty-first day of August, Nineteen hundred and fifteen.

Whereas, the above named Howard Gould is about to prosecute a writ of error to the United States Supreme Court to reverse an order of the Appellate Division of the Supreme Court, First Judicial Department, dated April 1st, 1915, affirming the order of the Supreme Court of the State of New York entered in the office of the Clerk of New York County on the 5th day of January, 1915, denying the motion made by Howard Gould to vacate a judgment entered in the office of the Clerk of New York County on the 7th day of August, 1914, in favor of the Plaintiff and against said Howard Gould for the sum of $212.79; and whereas, the petition of the said Howard Gould for writ of error had been allowed by one of the Justices of the Supreme Court of the United States, and the amount of the bond fixed by said Justice at the sum of Five hundred dollars ($500); and whereas the said Howard Gould has filed the said petition for writ of error with the allowance of the writ endorsed thereon by a Justice of the United States Supreme Court in the office of the Clerk of the said Court;

Now, therefore, the condition of this obligation is such that if the above named Howard Gould shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation is to be void; else to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney in Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney in Fact.*

38 STATE OF NEW YORK,
County of New York, ss:

On the 31st day of August, in the year 1915, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley and knew him to be the Attorney in Fact of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] F. A. MASSEY,
Notary Public, New York County, No. 65.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kings-"ley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, "Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and "Frank A. Eickhoff, all of the City of New York, State of New "York, be and each of them is hereby appointed Attorney-in-Fact "of this Company and empowered to execute and deliver and attach "the seal of the Company to any and all bonds or undertakings for "or on behalf of this Company, in its business of guaranteeing the "fidelity of persons holding places of public or private trust and the "performance of contracts other than insurance policies, and ex-"ecuting or guaranteeing bonds or undertakings required or per-"mitted in all actions or proceedings, or by law required, permitted "or allowed.

"Such bonds or undertakings to be executed for the Company "by any one of the said Henry B. Platt, James R. Kingsley, Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, "Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and "to be attested in every instance by one other of the said Attorneys-"in-Fact, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 31st day of August, 1915.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31, 1914.

Resources.

Home Office Building, Charles and Lexington Streets	$2,375,000.00
Other Real Estate, 214 N. Charles St., &c.	185,137.41
Bonds and Stocks	6,008,060.50
First Mortgage Loans	229,504.02
Agents' Debit Balances, Gross (Surety)	687,525.67
Agents' Debit Balances, Gross (Casualty)	892,013.38
Re-insurance due from other Companies	70,476.86
Bank Deposits for use of Branch Offices	76,840.00
Cash in Banks and Trust Companies	1,257,938.58
Total	$11,782,496.42

Liabilities.

Reserve for Unearned Premiums		$3,388,309.15
Reserve for Claims, Admitted and Unadmitted		2,019,604.24
Reserve for Agents' Commissions		384,123.90
Reserve for Premium Taxes, & Expenses in Transit		130,000.00
Reserve for Unpaid Re-insurance		41,978.03
Reserves—Special and Contingent		138,841.80
Capital Stock	$3,000,000.00	
Surplus	2,000,000.00	
Undivided Profits	679,639.30	
Surplus to Policyholders		5,679,639.30
Total		$11,782,496.42

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1914, to the best of his knowl-

edge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 31" day of August, 1915.

F. A. MASSEY,
Notary Public, New York County, No. 65.

38½ [Endorsed:] 21927. 1914. Supreme Court of the United States. Katherine C. Gould, Plaintiff, against Howard Gould, Defendant. Copy. Bond. I approve of the within Bond and of the sufficiency of the surety therein. Dated Rangeley, Maine, Sept. 6 15. Charles E. Hughes, Associate Justice of Supreme Court of U. S. Fidelity and Deposit Company of Maryland, 2 Rector Street, New York.

39 To the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States:

The Petition of Howard Gould, a citizen of the State of New York, respectfully shows:

1. That on the 22d day of September, 1909, in an action pending in the Supreme Court in the County and State of New York, after a trial before Mr. Justice Dowling, there was entered nunc pro tunc as of June 25, 1909, and filed in the Office of the Clerk of New York County, a final judgment separating the plaintiff in that action, Katherine Gould, and the defendant, Howard Gould, from bed and board forever, and requiring the defendant to pay plaintiff, during the natural life of plaintiff, the sum of three thousand ($3,000) dollars each and every month from the date of said judgment; that Howard Gould, the defendant in said action, is the petitioner herein; that the alimony awarded Katherin Gould by the terms of said judgment was thereafter duly and regularly paid her as required by the provisions thereof.

2. That after the passage of the Federal Tariff Act of 1913 entitled "An act to Reduce Tariff duties and to Provide Revenue for the Government and For Other Purposes", petitioner was advised by the United States Commissioner of Internal Revenue at Washington that alimony payable under a decree of separation is fixed and determinable annual income under the provisions of said income tax law, and that in cases where such alimony is in excess of three thousand ($3,000) dollars per annum, the person paying the
40 same is required to withhold the normal tax due the Government thereon; that thereafter, the petitioner, in obedience to the terms of said income tax law, deducted one (1%) per cent, the amount of the normal tax, from the $3,000 payable as aforesaid to Katherine Gould as alimony for each of the months of January, February, March, April, May, June and July, 1914; that the amount of such deductions aggregated the sum of $210; that said Katherine Gould has not claimed any deduction under paragraph C of said Income Tax Law.

3. That on the 6th day of August, 1914, Katherine Gould procured the making and entry of an ex parte order in the Supreme Court, New York County, which order recited that petitioner was in arrears in the payment of alimony due and payable under the judgment in said separation action, amounting to $210 principal and $2.79 interest, aggregating $212.79, and ordered the Clerk of the County of New York to enter a judgment in favor of said Katherine Gould and against petitioner for the sum of $212.79, pursuant to the provisions of Section 1246 of the Code of Civil Procedure of the State of New York; that on the 7th day of August, 1914, a final judgment was entered in the office of the Clerk of the County of New York under and pursuant to the terms of said order in favor of Katherine Gould against petitioner for the sum of $212.79.

4. That after the entry of said judgment petitioner made a motion in the Supreme Court, New York County, to vacate the judgment on the ground that the arrears in said alimony on which said judgment had been rendered was caused by the fact that petitioner
41 had deducted from the amount of the alimony payable under the terms of the judgment of separation the 1% which he was required to deduct and withhold by the provisions of said income tax law; that said motion was opposed by Katherine Gould, came on for argument before Mr. Justice Hendrick and was submitted on briefs for both parties.

5. That on the 5th day of January, 1915, an order was signed by Mr. Justice Hendrick, one of the justices of the Supreme Court of New York County, and entered in the office of the Clerk of New York County, denying the motion made by petitioner to vacate said judgment; that Mr. Justice Hendrick in denying the motion wrote a short opinion in which he stated that alimony was not "income" within the meaning of the Federal Income Tax Law.

6. That thereafter petitioner appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the order denying his motion to vacate the judgment for $212.79; that under the laws of the State of New York, said Appellate Division was the only court that had jurisdiction to hear and determine said appeal; that a transcript of the proceedings in the court below was filed in said Appellate Division and the appeal from the judgment for $212.79 and from the order denying the motion to vacate the judgment, Came on for argument in said Appellate Division and was submitted on briefs by both parties; that on the 1st day of April, 1915, said Appellate Division unanimously affirmed without opinion the order appealed from, and an order of affirmance was entered in the office of the Clerk of said Court; that immediately thereafter a certified
42 copy of the order of the Appellate Division affirming the order appealed from was filed in the office of the Clerk of New York County as required by law, together with the original case or papers on which said appeal was heard; that on the 8th day of April, 1915, the costs and disbursements of the appeal in the sum of twenty-two dollars and sixty-two cents ($22.62) were taxed against petitioner.

7. That thereafter on the 22d day of April, 1915, petitioner served on the attorneys for Katherine Gould a notice of Appeal to the

Court of Appeals from the order of the Appellate Division affirming the order appealed from and at the same time filed an undertaking in the sum of $500 to secure the payment of costs and damages and also an undertaking to secure the payment of the judgment for $212.79; that immediately after the service of said notice of appeal and on the 23d day of April, 1915, the attorney for Katherine Gould made a motion in the Court of Appeals to dismiss the appeal so attempted to be taken on the ground that leave to appeal had not been granted petitioner by the Appellate Division, First Department, under the provisions of Sections 190 and 191 of the Code of Civil Procedure of the State of New York; that said motion came on for argument before the Court of Appeals and was duly submitted and thereafter on the 4th day of May, 1915, the Court of Appeals dismissed without opinion said appeal so attempted to be taken by petitioner as aforesaid to that court; that a copy of the order of dismissal is hereto annexed and made a part hereof; that on the 11th day of May, 1915, an order was duly made by Mr. Justice Weeks, one of the justices of the Supreme Court of New York County and
43 entered in the office of the Clerk of New York County, ordering and directing that the order of the Court of Appeals, dated May 4, 1915, dismissing the said appeal, be made the order of the Supreme Court.

8. That thereafter on the 14th day of May, 1915, and at the next term of the Appellate Division after the entry of the order of affirmance, petitioner made a motion before the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, asking that court for the certificate authorized by subdivision 2 of Section 190 of the Code of Civil Procedure of the State of New York to the effect that in its opinion questions of law were involved that ought to be reviewed by the Court of Appeals and asking it to certify to the Court of Appeals for review the question whether or not alimony of $3,000 per month awarded to the wife by the terms of the final decree in a separation action constituted "gains, profits and income" within the meaning of the provisions of Section II of the Tariff Act of 1913 passed by the United States Congress entitled "An act to Reduce Tariff Duties and to Provide Revenue for the Government and For Other purposes" and whether or not the husband should deduct and withhold from the amount of said alimony of $3,000 the normal tax of 1% claimed by the Federal Government to be due thereon; that the said motion came on for argument before the Appellate Division on the 21st day of May, 1915, and was submitted without argument; that thereafter, on the 28th day of May, 1915, said Appellate Division denied the motion and an order was entered in the office of the Clerk of said court to that effect.

44 9. That said Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is now and was at the time of said appeal, the highest court of the State of New York that could pass on the right of petitioner to have said judgment for the sum of $212.79 set aside, annulled and vacated, unless said Appellate Division should certify questions of law involved

therein for review by the Court of Appeals under Section 190 of the Code of Civil Procedure of the State of New York, which said Appellate Division declined to do.

10. That there was drawn in question and involved in this suit the right, privilege and duty of petitioner to withhold and deduct under the provisions of the Federal Income Tax Law of 1913, the amount of the normal tax due by Katherine Gould to the Federal Government on the ground that the alimony payable to Katherine Gould by the terms of said judgment of separation was income under the provisions of said Federal Income Tax Law and that petitioner was required by said Income Tax Law to deduct from said alimony payable to Katherine Gould for said months the sum of $210 and that petitioner was personally liable to the Federal Government for the amount so deducted and that said judgment of $212.79 was therefore illegal and should be vacated; that this right, privilege and duty on the part of petitioner was set up and claimed on petitioner's motion to vacate the judgment for $212.79 and on the appeal from the order denying said motion.

Wherefore your petitioner prays that a writ of error may issue and that he may be allowed to bring up for review before the Supreme Court of the United States the said order of said Ap-
45 pellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming the order appealed from; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

MARTIN W. LITTLETON,
Attorney for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Martin W. Littleton, being duly sworn, deposes and says that he is attorney for Howard Gould, the petitioner named in the foregoing petition; that his petition cannot be signed and verified by Mr. Gould for the reason that he is not in the State of New York but is in France at the present time; that deponent is familiar with the facts stated in the foregoing petition and the facts therein stated are true.

——.——.

Sworn to and subscribed before me this 25th day of August, 1915.
EDWARD A. GILL WYLIE.

(Endorsed:) Howard Gould v. Katherine Gould. Petition for Writ of Error. Filed —.

46 Supreme Court, New York County.

File #21927—1914.

KATHRINE C. GOULD, Plaintiff,
against
HOWARD GOULD, Defendant.

In obeying a writ of error dated September 7th, 1915, signed by James D. Maher, Clerk of the Supreme Court of the United States and allowed by Hon. Charles E. Hughes, Associate Justice of said court, directing you to send the record and proceedings in the suit in the Supreme Court of the State of New York between Katherine Gould, plaintiff and Howard Gould, defendant, to the Supreme Court of the United States within thirty days from the said writ of error and under the provisions of Rule 8 of the Rules of the Supreme Court of the United States, you are hereby requested in transmitting true copies of the record and proceedings in said cause, to send the following:

1. Petition for writ of error in Katherine C. Gould, plaintiff, against Howard Gould, defendant, addressed to the Hon. Charles E. Hughes, Associate Justice of the Supreme Court of the United States, signed by Martin W. Littleton, attorney for Petitioner, Howard Gould, verified the 25th day of August, 1915, with the endorsement of Mr. Justice Hughes directing the issue of the writ with the endorsement thereon of an entry by Mr. Justice Hughes, dated August 27, 1915 directing the issuance of the writ of error prayed for.

2. The writ of error signed by the Clerk of the Supreme
47 Court of the United States dated September 7th, 1915, allowed by Hon. Charles E. Hughes, Associate Justice of said court, this day filed with you.

3. Assignment of errors in the case of Howard Gould, plaintiff in error, against Katherine Gould, defendant in error, dated New York City, August 30, 1915, which is this day filed with you.

4. Citation in Error dated September 7, 1915, signed by Charles E. Hughes, Associate Justice of the Supreme Court of the United States, directed to Katherine Gould, which is this day filed with you.

5. Notice of Appeal signed by Martin W. Littleton, attorney for defendant, Howard Gould, addressed to Griggs, Baldwin & Baldwin and William F. Schneider, dated January 28th, 1915, from an order denying defendant's motion to vacate the judgment for $212.79 in favor of the plaintiff, Katherine Gould against defendant, Howard Gould, which judgment was entered in the Office of the Clerk of New York County on the 7th day of August, 1914.

6. Order signed by Mr. Justice Peter A. Hendrick, dated January 5, 1915, filed in the office of the Clerk of New York County on the same day, denying motion made by Howard Gould to vacate said judgment for $212.79 in favor of plaintiff, Katherine Gould against

defendant, Howard Gould, and entered in the office of the Clerk of New York County, on August 7, 1914.

7. Notice of Motion dated October 26, 1914, signed by Martin W. Littleton, as attorney for Defendant, Howard Gould, to vacate and set aside said judgment for $212.79.

8. The affidavit of Owen N. Brown, verified October 26, 1914, in support of said motion to vacate said judgment for $212.79.

48 9. Final decree in the separation action tried in the Supreme Court of New York County in the case of Katherine Gould, plaintiff, against Howard Gould, defendant, entered in the Office of the Clerk of New York County, September 22, 1909, nunc pro tunc as of June 25, 1909, signed by Mr. Justice Victor J. Dowling, separating Katherine Gould, plaintiff and Howard Gould, defendant, from bed and board forever and requiring Howard Gould, defendant, to pay to Katherine Gould, plaintiff, the sum of $3,000 per month from the date of the entry of said judgment for her support and maintenance during her natural life and ordering and judging that plaintiff, Katherine Gould, will recover from defendant, Howard Gould, Three Thousand, Six Hundred and Eighty-three and 56/100 ($3,683.56) dollars with costs and disbursements of said action.

9. Order signed by Mr. Justice John Ford on the 6th day of August, 1914, in the case of Katherine Gould, plaintiff, against Howard Gould, defendant, pending in the Supreme Court, New York County, which order was entered in the Office of the Clerk of New York County on the 6th day of August, 1914, ordering that plaintiff Katherine Gould, recover from the defendant Howard Gould, judgment for the sum of $212.79 on account of arrears of alimony and interest and directing the Clerk of New York County to docket said judgment in favor of Katherine Gould and against Howard Gould for $212.79, pursuant to the provisions of Section 1246 of the Code of Civil Procedure.

10. Affidavit of Katherine Gould in the case of Katherine Gould, plaintiff, against Howard Gould, defendant, in the Supreme Court, New York County, verified August 4, 1915, in support of said motion for judgment for $212.79 in which affidavit Katherine Gould claims that Howard Gould is in arrears in the sum of $210.00 in

49 payment of alimony of three thousand ($3,000) dollars per month directed to be paid to her by Howard Gould, under the decree of said separation action.

11. Opinion of Mr. Justice Peter A. Hendrick on motion made by defendant Howard Gould to vacate said judgment for $212.79, said opinion being among the papers in file No. 21927-1914.

12. Stipulation signed by Martin W. Littleton, Attorney for Howard Gould and by Griggs, Baldwin & Baldwin, Attorneys for Katherine Gould, dated March 1st, 1915, found on page 19 of the printed papers on appeal to the Appellate Division from the order denying the motion made by Howard Gould to vacate said judgment for $212.79 (see file No. 21927-1914).

(All the papers specified above from Nos. 5 to 12 inclusive, will

be found in the printed papers on appeal, filed in the Office of the Clerk of New York County.)

13. Copy of the Order of the Appellate Division of the Supreme Court, First Department, dated April 1, 1915, affirming the said order of Mr. Justice Hendrick denying the motion made by Howard Gould, to vacate the said judgment for $212.79 in favor of Katherine Gould and against Howard Gould, a copy of which said order and of the original case or papers on said appeal to the Appellate Division, were filed in the office of the Clerk of New York County on or about April 1st, 1915. (See File No. 21927-1914.)

14. Copy of the order made by the Appellate Division of the Supreme Court, First Department, on the 28th day of May, 1915, denying the motion made by Howard Gould, asking the Appellate Division, First Department, to certify to the Court of Appeals for review the question whether or not alimony was "gains,
50 profits or income" within the meaning of the provisions of Section II of the Tariff Act of 1913, copy of which was immediately thereafter filed in the office of the Clerk of New York County.

Dated New York City, September 14, 1915.

Respectfully submitted,

MARTIN W. LITTLETON,
Attorney for Defendant, Howard Gould.

Office & Post Office Address, 149 Broadway, New York City, N. Y.

To William F. Schneider, Esq., Clerk, New York County, County Court House, New York City, N. Y.

51 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York, for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 14th day of Sept., 1915, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 50 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Katherine Gould, plaintiff, and Howard Gould, defendant, mentioned in said Writ of Error, as the same remain of record and on file in my office: and that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and the said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court

to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 26th day of Oct. 1915.

[SEAL.] WM. F. SCHNEIDER, *Clerk.*

[United States internal revenue documentary stamp, series of 1915, ten cents, canceled Oct. 28, 1915. O. O. O.]

[Endorsed:] File No. 21927-1914. New York Supreme Court, New York County. Kathrine C. Gould, plaintiff, against Howard Gould, defendant. Præcipe. Martin W. Littleton, Attorney for defendant. Office and Post-Office Address, 149 Broadway, New York City. Due and timely service of a copy of the within is hereby admitted. Dated New York, —— —, 191—. ——— ———, Attorney for ——.

Endorsed on cover: File No. 24,985. New York Supreme Court. Term No. 702. Howard Gould, Plaintiff in Error, vs. Katherine Gould. Filed November 10th, 1915. File No. 24,988.

BRIEF FOR PLAINTIFF IN ERROR.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. [redacted] 41

HOWARD GOULD,
Plaintiff in Error,

against

KATHERINE GOULD,
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MARTIN W. LITTLETON,
Attorney for Plaintiff in Error,
149 Broadway,
New York, N. Y.

OWEN N. BROWN,
Of Counsel.

B. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Subject Index.

	PAGE
Alimony is taxable as income	4
Assignment of Errors	4
Brief of Argument	4
Point I. Alimony is income within the meaning of the Income Tax Law	4
Statement of the case	1

Index of Cases.

	PAGE
Black on the Income Tax Law	8
Smythe *vs.* Fisk, 23 Wallace 374	5
Thayer *vs.* Thayer, 145 App. Div. (N. Y.) 268	2
United States *vs.* Stowell, 133 U. S. 1	5
White on Federal Income Tax Law	4

Supreme Court of the United States,

OCTOBER TERM, 1916,

No. 282.

HOWARD GOULD,
Plaintiff in Error,

against

KATHARINE GOULD
Defendant in Error.

Statement of the Case.

This cause comes here on writ of error to the Supreme Court of the State of New York, allowed by Mr. Justice Hughes (Trans. fol. 24), to review a judgment of said Supreme Court in favor of the defendant in error against the plaintiff in error for the sum of $212.79. On October 22, 1909, a final decree was rendered in the Supreme Court of the State of New York, adjudging that defendant in error and plaintiff in error, be separated from bed and board forever, and that the plaintiff in error pay to the defendant in error the "sum of $3,000. every month from the date of the entry of this decree for the support and maintenance of plaintiff during her natural life"

(Trans. fol. 12). After the passage of the Federal Internal Revenue Act of 1913, known as the Income Tax Law, plaintiff in error withheld the one per cent normal tax required by said law on the amount of said alimony payable to the defendant in error, for the period commencing November 1, 1913, and ending July 31, 1914 (Trans. fol. 14). On the 6th of August, 1914, an *ex parte* order was made by a Justice of the Supreme Court of the State of New York and entered in the office of the Clerk of said Court, directing the entry of judgment in favor of the defendant in error and against the plaintiff in error for the sum of $210. principal, and $2.79 interest, aggregating $212.79, on account of the arrears of alimony caused by the plaintiff in error withholding the said 1% for the months hereinbefore set out (Trans. fols. 14, 15). This order was based on the affidavit of the defendant in error showing arrears in the payment of said alimony (Trans. fol. 16). This affidavit did not show that said arrears was caused by the withholding of said amount under the provisions of the Federal Income Tax Law. The order directing a judgment was entered in pursuance of the practice sanctioned in Thayer *v.* Thayer, 145 App. Div. 268. Judgment was thereafter on August 7, 1914, duly entered by the Clerk of said Court in pursuance of said order against plaintiff in error for said sum of $212.79 (Trans. fol. 18). Thereafter on October 26, 1914, plaintiff in error made a motion to vacate and set aside said judgment and for general relief (Trans. fols. 4-11). Said motion came on regularly for hearing and was denied (Trans. fols. 19, 20) and an order to this effect duly entered (Trans. fol. 3). Thereafter plaintiff in error duly appealed to the Appellate Division of the Supreme Court of the

State of New York, First Department, from the order denying the motion to vacate said judgment (Trans. fol. 21). On the first day of April, 1915, said Appellate Division unanimously affirmed, without opinion, the order appealed from and an order of affirmance was entered in the office of the Clerk of said Court, and a certified copy thereof immediately filed in the office of the Clerk of the County of New York as required by law (Trans. fols. 21, 42). Thereafter plaintiff in error appealed to the Court of Appeals of the State of New York and said appeal was dismissed on the motion of the defendant in error (Trans. fols. 28, 32). After the dismissal of said appeal by the Court of Appeals plaintiff in error made a motion before the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, asking that Court for a certificate under Subdivision 2, Section 190, of the Code of Civil Procedure, to the effect that in its opinion questions of law were involved that ought to be reviewed by the Court of Appeals, and requesting it to certify to the Court of Appeals for review the question, whether or not the alimony of $3,000. per month awarded to the wife by the terms of the final decree in the separation action, constituted gains, profits and income within the meaning of the provisions of Section 2 of the Tariff Act of 1913, passed by the United States Congress (Trans. fol. 29). The Appellate Division denied said motion on May 28, 1915 (Trans. fol. 22). Thereafter in the month of September, 1915, plaintiff in error presented his petition to Mr. Justice Hughes asking for a writ of error to bring up for review before this Court the question of the right, privilege and duty of the plaintiff in error to withhold under the provisions of the Federal Income

Tax Law of 1913 the amount of the normal tax due by defendant in error to the Government (Trans. fol. 30). The writ was allowed by Mr. Justice Hughes (Trans. fol. 24).

The question presented on this writ of error is, whether alimony paid under said decree of separation is "gains, profits and income" within the meaning of the Income Tax Law of 1913. This question is properly raised in various forms by the assignments of error (Trans. fols. 33-35).

BRIEF OF ARGUMENT.

POINT I.

The alimony of $3,000. per month awarded by the terms of the final decree in the separation action is income within the meaning of the Federal Income Tax Law.

The Income Tax Law was incorporated as Section II of the Tariff Law of 1913 passed by Congress. This act is entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for other Purposes".

Mr. White, in his work on the Federal Income Tax Law, in speaking of the construction to be given this law from the title above-mentioned, says:

> "It is evident that without due additions from other sources the national revenues will be so depleted by the sweeping reduction of tariff duties provided by this Act as to result in an annual deficit. The legislative intent to

> meet this deficit through tax upon incomes is evident not only by the title of this Act but by the fact that the provisions for such tax are included in the Act itself and are of the most comprehensive character.
>
> "For these reasons, as well as in accordance with the rules of construction above discussed, it may be safely assumed that the Act will be accorded a construction of the utmost liberality toward the Government" (p. 31).

This law should be construed liberally so far as it may be necessary to carry out the purposes of its enactment. (Smythe *v.* Fisk, 23 Wall. 374; United States *v.* Stowell, 133 U. S. 1).

The terms of this law are very comprehensive. It taxes "the entire net income" of every citizen "arising or accruing from all sources", (Sec. II, A, Subd. 1).

Section II, A, subd. 1, provides, among other things:

> "That there shall be levied, assessed, collected and paid annually upon the entire net income arising from all sources in the preceding calendar year to every citizen of the United States * * * a tax of one per centum per annum upon such income, except as hereinafter provided * * *".

Section II, A, Subd. 2, provides, among other things:

> "Every person subject to this additional tax (over and above the normal tax) shall for the purpose of its assessment and collection, make a personal return of his total net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury".

The question then arises: What do the words "net income" mean in such Act?

This question is answered by Section II, B, which provides:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent."

Section II, D, provides, among other things:

> "And also all persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies, except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal or payment of fixed or determinable annual or periodical gains, profits, and income of another person, subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown".

Section II, E, provides, among other things:

> "All persons firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, in whatever capacity acting, including lessees or mortgagors of real or personal property, trustees acting in any trust capacity, executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits and income of another person, exceeding $3,000. for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another as provided herein, to the collector of his, her, or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. * * *"

Section II, C, provides:

> "That there shall be deducted from the amount of the net income of each of said persons, ascertained as provided herein, the sum of $3,000., plus $1,000. additional if the person making the return be a married man with a wife living with him, or plus the sum of $1,000. additional if the person making the return be a married woman with a husband living with her; but in no event shall this additional exemption of $1,000. be deducted by

> both husband and a wife; *Provided*, That only one deduction of $4,000. shall be made from the aggregate income of both husband and wife when living together."

The question then is: Is the alimony received by the wife a "gain" or an "income" *from any source whatever*, within the meaning of said law? The question involved is: What is the meaning of the words "gain" and "income" as used in this statute?

Mr. Black, in his work on the Income Tax Law, after discussing the word "income", says:

> "Unless limited by the context, however, the word 'income' is one of very broad and comprehensive meaning * * *". (Section 32, p. 76.)

At the end of Section 32, he says:

> "We conclude, therefore, that for the purpose of the income tax a proper definition of the word 'income' would be: 'All that a man receives as cash during the year, except such sums as are merely capital or principal in a changed form, that is, excluding sums which are merely the proceeds of some other form of capital converted into cash".

In Section 33, after discussing the word "profit", the same author says at the bottom of page 80:

> "It is not quite so easy to account for the use of the word 'gain' in conjunction with the two other terms which we have been considering (profit and income), but it may probably be said that when a tax law employs the phrase 'gains, profits and income' to describe what is taxable, the term 'gains' is inserted out of abundant caution, and intended

> to include an acquisition of the tax payer which is not to be described as a 'profit' and which might not be included in the term 'income' if that word were taken in a narrow sense. Properly speaking, 'gain' means that which is acquired or comes as a benefit and in a statute laying an income tax it may mean money received within the year which is not the fruit of a business transaction nor of the labor or exertion of the individual, but something arising from fortuitous circumstances or conditions which he does not control. In this signification, the term would include money received as a legacy or money won on a wager."

It may be contended that this alimony is not taxable as income (1) because it is not compensation for personal services rendered by the wife; (2) because it is not profit or income from the transaction of any business by the wife, or through deals in property, and (3) because it is not income from money or property invested by the wife. Section B of said Act particularly specifies that income from the sources above enumerated shall be taxable and this enumeration includes "gains, or profits, and income derived from any source whatever", including the income from but not the value of property acquired by gift, bequest, devise or descent. This language is as general and comprehensive as it could well be made. It was recognized by Congress that property acquired by gift, bequest, devise or descent would be taxable as income under the prior general language unless excepted, and hence the insertion of this exception. This exception is one of the very few made to the broad and comprehensive terms of said law, and it is one of the well recognized rules in the construction of statutes that where

the exceptions are named, no other are to be engrafted on the law.

The primary source of the alimony paid under this decree is based on the legal duty of the husband to support the wife. Clearly, while living with the husband this support is not taxable because it is not "gains" or "income" under the terms of this law, but when the marital relation has been so far changed, either by decree of separation or of absolute divorce, and alimony has been awarded the wife for her maintenance and support while living apart from her husband under the terms of such decree, there has been such a change in the relation of the parties that said sum of money so awarded the wife becomes income under the general provisions of said law. New rights and liabilities have arisen between the husband and wife by the separation decree. While living with the husband her identity is largely merged in that of the husband. He determines the family residence and she must follow. She is supposed to be at home looking after or supervising the family affairs while he is out earning a living for the family, of which she is a part. The husband determines within reasonable limits what sum shall be expended for the maintenance and support of the family. When the wife, however, has been separated from the husband by a decree in an action of separation, she is relieved of all her marital burdens except that of drawing her monthly allowance by way of alimony and the prohibition against her remarriage. It is true she is not permitted to marry if the decree is one from bed and board, but she is not compelled to live with the husband, she is not compelled to discharge the ordinary and necessary duties of a wife, and there

is no doubt that there has been a complete change in her status. We think it is obvious that a woman who has been separated from her husband by judicial decree of separation is an entirely distinct person under the terms of the Income Tax Law from her husband. Section II, C, of the law, recognizes that there is a great difference between the wife who is living with the husband and the wife who is not, and provides that where the husband and wife are "living together" that only one deduction of $4,000. shall be made from the aggregate income of both husband and wife. The Treasury Department holds that where a husband and wife are living separate and apart each is entitled to deduct the sum of $3,000. from the amount of his or her income, whereas, if living together, they could make only one deduction of $4,000. from the amount of their aggregate net income. Clearly Congress has the power to tax this alimony as income or gain of the wife. It is in fact a gain or income. It is fixed and determinate. It has a definite source. The clear unequivocal language of the Act is sufficient to include this asset of the wife. There is no substantial or reasonable ground for doubt as to whether this particular income is taxable income within the meaning of said law. The fact that the Judge in fixing the amount of this alimony in the separation action intended that the whole amount awarded should be paid to Mrs. Gould, free from any charge, tax or lien of any kind, is not material in passing on the construction of the Income Tax Law. This intent could not deprive Congress of the right to tax this award as a gain or income of the wife.

POINT II.

It is respectfully submitted that said judgment of $212.79 in favor of the defendant in error against the plaintiff in error should be reversed.

MARTIN W. LITTLETON,
Attorney for Plaintiff in Error,
Office and P. O. Address,
149 Broadway,
Borough of Manhattan,
New York City.

OWEN N. BROWN, ESQ.,
of Counsel.

Office Supreme Court, U. S.
FILED
NOV 2 1917
JAMES D. MAHER,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1916

No. 282 41

HOWARD GOULD,
Plaintiff in Error,

vs.

KATHERINE GOULD,
Defendant in Error.

On Writ of Error to the Supreme Court of the State of New York.

BRIEF FOR DEFENDANT IN ERROR.

JOHN L. McNAB,
14 Montgomery Street, San Francisco,
Attorney for Defendant in Error.

Filed this _____ *day of October, 1917.*

JAMES D. MAHER, Clerk.

By _____ *Deputy Clerk.*

PERNAU PUBLISHING CO., SAN FRANCISCO

In the Supreme Court
OF THE
United States

October Term, 1916
No. 282

Howard Gould,
Plaintiff in Error,
vs.
Katherine Gould,
Defendant in Error.

On Writ of Error to the Supreme Court of the State of New York.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Plaintiff in error has correctly set forth the various proceedings had in the several courts below and the general question raised by the writ of error. It may, however, add to the clarity of the argument to state that the alimony awarded to defendant in error by the terms of the final decree was in a decree of separation from bed and board and not of a divorce and that the decree awarding defendant in error the sum of $3000 every month was "for the support and maintenance of the plaintiff during her natural life" and that such

payments were declared in the decree "not to be in lieu of plaintiff's right of dower in the defendant's real estate" (Trans. fol. 12).

The concrete question argued by plaintiff in error is whether the alimony of $3000 per month awarded by the terms of the final decree in the separation action at bar is *income* within the meaning of the Federal Income Tax Law of 1913. The consideration of this question raises the following propositions, affirmatively stated, namely, that:

The Federal Income Tax Law of 1913 intends to tax only incomes, and alimony is not an income within the meaning of that Act.

The Sixteenth Amendment to the Constitution merely authorizes the taxation of incomes, and if the language of the Federal Income Tax Law of 1913 is broad enough to cover alimony, then said Act is unconstitutional.

Brief of Argument.

I.

PLAINTIFF IN ERROR CONTENDS THAT THE ALIMONY OF $3000 PER MONTH AWARDED BY THE FINAL DECREE OF SEPARATION IS INCOME WITHIN THE MEANING OF THE FEDERAL INCOME TAX LAW. DEFENDANT IN ERROR CONTENDS THAT SAID ALIMONY IS NOT INCOME WITHIN SAID LAW.

Plaintiff in error bases his argument upon certain fundamentally incorrect rules of construction in respect to revenue laws.

Mr. Justice Story, in United States v. Wigglesworth, 2 Story 369, in holding that the Revenue Act of 1841 did not intend to levy a certain permanent duty on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, *although standing upon a close analogy.* In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue laws are in no just sense remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed. Hence in the present case, if it be a matter of real doubt whether the intention of the Act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period when it would otherwise be free."

Accordingly the rule is well settled that no person or property will be included within the scope of a law imposing taxes unless explicitly placed there by clear language of the statute.

Benziger v. United States, 192 U. S. 38;

Spreckels Sugar Co. v. McClain, 192 U. S. 397.

Plaintiff in error sets forth the several paragraphs from the Income Tax Law in his effort to show the meaning of the term, "net income", as used in the Act.

The Act in section II-A, subdivision 1, provides, among other things:

> "That there shall be levied, assessed collected and paid annually upon the entire *net income* accruing or arising from all sources in the preceding calendar year * * * a tax of one per centum per annum upon such income * * *."

Paragraph B of said section II defines the net income of a taxable person, as follows:

> "* * * the net income of a taxable person shall include gains, profits, and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, *or gains or profits and income derived from any source whatever*, including the income from, but not the value of property *acquired by gift, bequest, devise or descent.*"

The other paragraphs of the Act set forth by plaintiff in error merely refer to the right of a person to withhold the normal tax which is the subject-matter of this litigation and which is not questioned by defendant in error if the alimony in question is a proper subject for taxation.

It will be observed that alimony is not mentioned in the *enumerated* sources of net income and consequently if it is covered at all by the definition of net income as set forth in said paragraph, it must be found in the latter part thereof in the clause "*or gains*

or profits and income derived from any source whatever." The clause in question does not read "gains or profits *or* income" but "gains or profits *and* income". Consequently the question is whether alimony may be considered a "gain" or a "profit and income", within the meaning of the Act.

The word "income" is not synonymous with the word "receipts".

Von Baumbach v. Sargent Land Co., 219 Fed. 31.

The term "income" as used in the Act of October 3, 1913, should not be given a meaning so as to include everything that comes in. The true function of the words "gains" and "profits" is to limit the meaning of the word "income" and to show its use only in the sense of *receipts which constitute an accretion to capital.* Hence the function of the word "income" should be to limit the meaning of the words "gains" and "profits". The increased value of capital as such constitutes in one sense a gain or profit, but not income. Consequently such gain or profit is not taxable but only such profits and gains as constitute income are taxable.

Southern Pac. Co. v. Lowe, 238 Fed. 847.

Income is defined as that gain which proceeds from labor, business, property or capital of any kind, as the produce of a farm, the rent of houses, the proceeds of professional business, the profits of commerce or of occupation, or the interest of money or stock in funds;

revenue, salary, especially the annual receipts of a private person or a corporation from property.

Mundy v. Van Hoose, 104 Ga. 625;
Sowards v. Taylor, 42 Ill. App. 275;
Remington v. Field, 16 R. I. 509;
Thorn v. De Breteuill, 86 App. Div. (N. Y.) 405.

Where the word "income" is used in connection with the phrase "gains, profits and income" it may take meaning from the more restricted term and be limited by it. In other words, the word "income" in such circumstances *should not be taken in its most extensive signification* but rather as meaning income which is in the nature of a profit; in other words, as net income.

Morton's Ex'r v. Morton's Ex'r, 112 Ky. 706.

Profit is the gain made on any business or investment when both the receipts and expenditures are taken into consideration.

Providence Rubber Co. v. Goodyear, 9 Wall. 788;
Mayer v. Nethersole, 71 App. Div. (N. Y.) 383.

It is the excess of the value of the returns over the value of advances, the excess of receipts over expenditures.

People v. San Francisco Sav. Union, 72 Cal. 199.

In the early case of Waring v. Savannah, 60 Ga. 93, the Court very picturesquely distinguished between property and income, as follows:

> "The fact is, property is a tree; income is the fruit; labor is a tree; income, the fruit; capital, the tree; income, the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the seed which it encloses, and will produce other trees,

> and grow into more property; but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit."

The words "income, gains and profits" in the Act of October 3, 1913, are used in common parlance and as legal terms in contradistinction to capital, property and capital assets.

Lynch v. Turrish, 236 Fed. 653.

Receipts which are but changes of capital investment or which represent a distribution of capital assets, do not constitute gain or profit.

Southern Pac. Co. v. Lowe, 238 Fed. 847.

But it is only gains or profits which are in the nature of income which are taxable under the Act. If they constitute merely capital or principal in a changed form or a mere advance in value of property between the time of acquisition and disposition, they will not be taxable as income.

Gray v. Darlington, 15 Wall. 63.

It is a fundamental rule of construction of statutes that the meaning of a doubtful word or phrase may be ascertained by a reference to the meaning of associated words or phrases, and that where several things are referred to, they are presumed to be of the same class when joined by a copulative conjunction unless a contrary intent is plainly manifest.

Applying these principles, it is clear that alimony is not comprised within the term "profits and income derived from any source whatever" since the term

"profits" limits the income to such an income as is the result of an excess of receipts over expenditures. Hence the only question then is whether alimony may be considered as covered by the term "gains", but the term "gains" cannot be construed in its broadest significance but must be construed in connection with the term "income" since it is used merely as descriptive of income, and Congress was limited to the power of legislating only in respect to taxing incomes. The forepart of the paragraph in which the word "gains" occurs shows the general character of sources of income which Congress had in view, and the clause excluding "the value of property acquired by gift, bequest, devise or descent" shows that there were gains which were not contemplated as in the character of income.

That alimony was not intended to be covered by the Income Tax Law is made particularly clear when its nature, character and purpose is considered. We are speaking of alimony which is the award of a Court and not the payments made under a contract made by the parties themselves which would be in the nature of an annuity. In the case at bar the alimony was awarded defendant in error in a decree of separation from bed and board. It is not compensation to her in lieu of her dower rights (Trans. fol. 12) and hence is not in the nature of contractual payments. Its nature is shown by the opinion of the Court in an appeal respecting its award (Gould v. Gould, 61 Misc. Rep. (N. Y.) 120, in which the Court said:

> "Undoubtedly the rule, as many times announced, is that the Court is not to limit the award of alimony to what is adequate to the wife's bare

existence. The wife is to be maintained in a manner fitting to her station in life; and for this purpose the alimony may sometimes be one-third or even one-half of the husband's income, if that result is reasonably necessary."

Alimony is substantially a substitute for that support and maintenance which the husband owes to the wife while living with him. It is immaterial, as far as coming within the terms of the Federal Income Tax Law, whether such alimony be large or small in amount. If it be large, as in the case at bar, it is merely because the support and maintenance afforded to the wife during the time the parties were living together was of an expensive character and in accordance with the large *income* of the husband. It is determined after a consideration by the Court of the amount of the husband's income and is in practice and effect *a part of his income*. The Court has ordinarily power to change or modify the amount awarded upon a showing of a material change in the husband's income. It being a part of the husband's income, it will be presumed that the husband has, before paying the amount to the wife, paid an income tax upon it. The law does not contemplate that two income taxes should be paid upon one income. It does not cease to be part of the husband's income upon being paid to the wife. The very character and purpose of the payment to her is evidence of that fact.

The presumption is that Howard Gould, the husband, has obeyed the law. If so he has paid out of his income the tax required by the United States. The

purpose of the Income Tax Law is to exact, once, from an income, its just tribute to the Government. It is not its policy to require the same income to pay twice. To require payment more than once from the same income would be double taxation.

The true test is whether the money which Howard Gould is compelled to pay Mrs. Gould as alimony, may be deducted by him as expenses, in determining his net income. It is needless to say that he can make no such deduction. The result is that he is paying the income tax upon the very money which he is paying to his wife as alimony, consequently to tax it in her hands is to tax it twice.

Reference is also made to the opinion of the Court below, appearing on folios 19 and 20 of the transcript.

In Audubon v. Shufeldt, 181 U. S. 575, the Court says:

> "Alimony does not arise from any business transaction but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the Court of appropriate jurisdiction. Generally speaking, alimony may be altered by that Court at any time, as the circumstances of the parties may require. * * * Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; *alimony from time to time may be regarded as a portion of his current income or earnings;* and the considerations which affect either may be best weighed by the Court having jurisdiction over the relation of husband and wife, than by a Court of a different jurisdiction."

These views were approved by the Court of New York in Matter of Williams, 208 N. Y. 32.

The alimony decree is not a debt which has been put into the form of a judgment but rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty not because of any contractual obligation or as debt from him to the wife but because of the policy of the law which imposes the obligation upon the husband.

Wetmore v. Markoe, 196 U. S. 68.

> Alimony "is not strictly a debt due to the wife but rather a general duty of support made specific and measured by the Court."
>
> Romaine v. Chauncey, 129 N. Y. 566.
>
> "It is an admeasurement by the Court of the marital obligation of support, which obligation is made specific, and the allowance becomes a debt only in the sense that the general duty over which the husband previously had discretionary control has been changed into a specific duty."
>
> Maisner v. Maisner, 62 App. Div. (N. Y.) 288.

In Van Ness v. Ransom, 215 N. Y. 557, the Court, in discussing the nature of an alimony decree, said:

> "But alimony is not a personal claim in the same sense that a cause of action for slander or assault is personal. It is personal in a sense that it is a provision made by the Court in favor of the wife for her maintenance and support, and cannot be diverted from that purpose. It takes the place of the husband's liability which ended with the divorce. If there had been no divorce the husband's liability would have con-

> tinued while the marital relation existed, and liability on the judgment should continue to the same extent."

If husband and wife are living together, it would not be contended that moneys given to her to be spent by her for any purposes which she saw fit would be taxable as an income on her part. It is true that by the decree of separation in the case at bar, the relations of husband and wife are modified to a certain extent, but the purpose of the alimony is to adjust in a legal and concise way a duty which otherwise was only limited by the good faith and benevolence of the husband according to the view presented by plaintiff in error. It is argued that because of the existence of the decree of separation plaintiff in error is not able to have the services of defendant in error in looking after or supervising his family affairs and for that reason the alimony payments to her are differentiated from payments to a wife living with her husband, but plaintiff in error forgets that the decree of separation was awarded by the Court to her because of his own failure to perform the marital duties required of him.

It would not be contended that a lump sum awarded to the wife as alimony in lieu of monthly or yearly payments would be considered as an *income* for the particular year when received. But such a lump sum would be of no different character than payments by the month or year.

Plaintiff in error attempts to draw a distinction between the status of a wife living apart from her

husband and one living with him from the fact that the Income Tax Law makes a difference in the deduction allowed from the gross income. This distinction is not well founded for the reason that a wife may have a separate income resulting from investments as well as a husband, and such an income being taxable, it is within the power of the taxing power to make rules and regulations respecting the amount of deductions to be made from the gross amount of income received.

It is submitted that alimony from the very nature of its source and purpose is not a taxable income within the meaning of the Income Tax Law.

II.

THE ACT OF OCTOBER 3, 1913, OF WHICH THE INCOME TAX PROVISIONS CONSTITUTE SECTION II IS UNCONSTITUTIONAL IF IT TAXES ALIMONY AS INCOME.

The Sixteenth Amendment to the Constitution merely permits *incomes* to be taxed. From the nature of alimony it is not an *income*. If the Act of Congress by its definition has made that income which without such definition would not in fact be income, it is in excess of the power to legislate granted by the Constitution. The Act of Congress cannot by the use of the words "gains or profits and income derived from any source whatever" make a "gain" which is not also in the nature of an income taxable as an income. The only purpose Congress could have had in using the

phrase mentioned was to cover the various forms in which income may be received and not to make something into income which otherwise would not be income.

A tax law should be construed in accordance with the settled policy of the state as proclaimed in its Declaration of Rights.

Monticello Distilling Co. v. Baltimore, 90 Md. 416.

Effect is to be given, if possible, to every clause of a tax law and it is the duty of the Courts to reconcile apparently conflicting provisions.

Board of Co. Com'rs. v. Wilson, 15 Colo. 90.

If by one construction a law will be valid and constitutional and by another it will be invalid and unconstitutional, it will be construed in favor of its validity and constitutionality.

People v. Gillson, 109 N. Y. 389.

III.

It is respectfully submitted that said judgment in favor of the defendant in error against the plaintiff in error should be affirmed.

Dated, San Francisco,
October 22, 1917.

JOHN L. MCNAB,
Attorney for Defendant in Error.

Mr. Martin W. Littleton and *Mr. Owen N. Brown* for plaintiff in error.

Mr. John L. McNab for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

A decree of the Supreme Court for New York County entered in 1909 forever separated the parties to this proceeding, then and now citizens of the United States, from bed and board; and further ordered that plaintiff in error pay to Katherine C. Gould during her life the sum of three thousand dollars ($3,000.00) every month for her support and maintenance. The question presented is whether such monthly payments during the years 1913 and 1914 constituted parts of Mrs. Gould's income within the intendment of the Act of Congress approved October 3, 1913, 38 Stat. 114, 166, and were subject as such to the tax prescribed therein. The court below answered in the negative; and we think it reached the proper conclusion.

Pertinent portions of the act follow:

"SECTION II. A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . .

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce,

or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: . . ."

In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story, 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55.

As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of "income" causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.

In *Audubon* v. *Shufeldt*, 181 U. S. 575, 577, 578, we said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; . . ."

The net income of the divorced husband subject to taxation was not decreased by payment of alimony under the court's order; and, on the other hand, the sum received by the wife on account thereof cannot be regarded as income arising or accruing to her within the enactment.

The judgment of the court below is

Affirmed.

GOULD *v.* GOULD.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 41. Submitted November 8, 1917.—Decided November 19, 1917.

Alimony paid monthly to a divorced wife under a decree of court is not taxable as "income" under the Income Tax Act of October 3, 1913, 38 Stat. 114, 166.

In the interpretation of taxing statutes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. Doubts are resolved against the Government.

168 App. Div. 909, affirmed.

THE case is stated in the opinion.